

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BUNGIE, INC., a Delaware corporation,

Plaintiff

v.

AIMJUNKIES.COM, a business of unknown
classification; PHOENIX DIGITAL GROUP
LLC, an Arizona limited liability company;
JEFFREY CONWAY, an individual; DAVID
SCHAEFER, an individual; JORDAN GREEN,
an individual; and JAMES MAY, an individual,

Defendants.

Cause No. 2:21-cv-0811 TSZ

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION FOR
PARTIAL DISMISSAL OF
PLAINTIFF'S FIRST
AMENDED COMPLAINT**

**Note on Motion Calendar:
July 15, 2022**

Defendants, in reply to Plaintiff Bungie's Opposition (Dkt# 54) and in further support of their motion for partial dismissal of Plaintiff's First Amended Complaint, hereby state as follows:

A. Bungie Glosses Over The Dispositive Nature Of The Ninth Circuit's Holding In *MDY Indus., LLC v. Blizzard*.

The clear holding of the Ninth Circuit in *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010) is directly on point and establishes that Bungie did not, and cannot establish copyright infringement under the facts it alleges and given the the undisputed facts established by the declarations of the Defendants. The clear holding of the Ninth Circuit in *MDY* is that the use, by players, of programs to enhance their performance (i.e., "cheat software") does not and *cannot* be a form of copyright infringement. At best, it is a breach of contract terms (i.e., "covenants") subject to different forms and types of remedies than those

1 available under copyright law. As the sole cause of action in Bungie’s First Amended
 2 Complaint involving copyrights is indisputably based on copyright infringement, not contract
 3 law, the holding in *MDY* compels dismissal of the copyright infringement charge alleged by
 4 Bungie.q

5 The facts in *MDY* are nearly identical to those here. In *MDY*, the program in question
 6 (named “Glider”) enabled World of Warcraft (“WoW”) players to gain advantages in playing
 7 World of Warcraft and, thus, advance more quickly through the game than others. In short,
 8 the subject program in *MDY* behaved much in the same manner as the “cheat software” at
 9 issue here. Blizzard Entertainment, the owner of World of Warcraft, claimed that MDY’s
 10 distribution of the Glider program constituted “secondary” or “induced” copyright
 11 infringement. In particular, Blizzard Entertainment argued that, when World of Warcraft
 12 players used the Glider program, they violated the terms of the software license granted to
 13 them and that violation of those terms resulted in copyright infringement. The Ninth Circuit
 14 soundly rejected that argument, holding that use by players of the Glider program in
 15 contravention of the software license was *not* copyright infringement and that any remedy
 16 must be pursued, if at all, for tortious interference with contract, a cause of action *not* pleaded
 17 by Bungie here.

18 The direct language of the Ninth Circuit in *MDY* makes this crystal clear:

19 “To establish secondary infringement, Blizzard must first demonstrate direct
 20 infringement.” *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 937 (9th
 21 Cir. 2010), citing *ProCd, Incorporated v. Zeidenberg*, 86 F.3d 1447, 1454 (7th Cir. 1996).
 22 “To establish direct infringement, Blizzard must demonstrate copyright ownership and
 23 violation of one of its exclusive rights by Glider users. ” 629 F.3d 928 at 937. “MDY is liable
 24 for contributory infringement if it has ‘intentionally induc[ed] or encourag[ed] direct
 25 infringement’” *Id.* Thus, under the clear holding in *MDY*, for Bungie to plead a legitimate
 26 claim of copyright infringement, it *must* plead sufficient facts to establish that *users* of the
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1 subject “cheat software” directly infringe one or more of Bungie’s purported copyrights. This
2 Bungie cannot do.

3 Returning to the actual language of *MDY*, “A Glider user commits copyright
4 infringement by playing WoW while violating a [software license] term that is a license
5 condition. *To establish copyright infringement*, then, *Blizzard must demonstrate* that the
6 violated term...is a condition rather than a covenant.” 629 F.3d 928 at 939 (emphasis
7 supplied). “Wherever possible, equity construes ambiguous contract provisions as covenants
8 rather than conditions.” *Id.* “Applying these principles, [the Software Licenses’] prohibitions
9 against bots and unauthorized third-party software *are covenants rather than copyright-*
10 *enforceable conditions.*” *Id.* at 40 (emphasis supplied). “To recover for copyright
11 infringement based on breach of a license agreement, (1) the copying must exceed the scope
12 of the defendant’s license and (2) the copyright owner’s complaint must be grounded in an
13 exclusive right of copyright (e.g., unlawful reproduction or distribution)” *Id.* “Consistent
14 with this approach, we have held that the potential for infringement exists *only* where the
15 licensee’s action (1) exceeds the license’s scope (2) in a manner that implicates one of the
16 licensor’s exclusive statutory rights.” *Id.* (Emphasis supplied.)

17 Finally, and most importantly, the Ninth Circuit in *MDY* directly held that software
18 license provisions purporting to proscribe such things as reverse engineering, “[disrupting]
19 another player’s game experience” and use of “cheat” or other third-party software are
20 “covenants” rather than “conditions,” and that engaging in such conduct *does not* constitute
21 copyright infringement. The import of this holding is not insignificant or trivial. In the words
22 of the Court, “*Were we to hold otherwise*, Blizzard — or any software copyright holder —
23 could designate any disfavored conduct during software use as copyright infringement, by
24 purporting to condition the license on the player’s abstention from the disfavored conduct.”
25 *Id.* at 41 (emphasis supplied). As a result, “This would allow software copyright owners far
26 greater rights than Congress has generally conferred on copyright owners.” *Id.*

1 Here, the operative provisions of Bungie’s “Limited Software License Agreement”
 2 (“LSLA”) are functionally the same as those in *MDY*. The operative provision of the “Terms
 3 of Use” in *MDY* read:

4 You agree that you will not . . . (ii) create or use cheats, bots, ‘mods,’ and/or hacks, or
 5 any other third-party software designed to modify the World of Warcraft experience;
 6 or (iii) use any third-party software that intercepts, ‘mines,’ or otherwise collects
 information from or through the Program or Service.

7 *MDY v. Blizzard*, 629 F.3d 928 at 938. The operative provision of the LSLA that Bungie
 8 asserts here reads:

9 You agree that you will not do, or allow, any of the following:...(8) hack or modify the
 10 Program, or create, develop, modify, distribute, or use any unauthorized software
 11 programs to gain advantage in any online or multiplayer game modes; (9) receive or
 provide “boosting services,” to advance progress or achieve results that are not solely
 based on the account holder’s gameplay...

12 Dkt# 34-1, pp. 19-20. Functionally, the relevant provisions of the LSLA are the same as
 13 those found by the Ninth Circuit in *MDY* to be the type for which a breach is a breach of
 14 contract rather than “copyright infringement.” Accordingly and as found by the Court, “Here,
 15 WoW players do not commit copyright infringement by using Glider in violation of the ToU.
 16 *MDY is thus not liable for secondary copyright infringement, which requires the existence of*
 17 *direct copyright infringement*” *MDY Industries, LLC v. Blizzard*, 629 F.3d 928, 941
 18 (emphasis supplied).

19 To the extent Bungie relies on a claim that the “cheat software” at issue here causes
 20 users of that software to directly infringe Bungie’s copyrights, Bungie has failed to plead
 21 sufficient facts to distinguish itself from the clear holding in *MDY*. Accordingly, this Court,
 22 as a matter of law, must dismiss any claim on the part of Bungie for “secondary” or “induced”
 23 infringement of copyright.¹

24
 25
 26 1 Although the Ninth Circuit in *MDY* found that Blizzard *could* proceed with its claims for violation
 27 of the DMCA and for tortious interference, it is important to remember that, in this case before this Court,
 28 Bungie only alleges copyright infringement. Its claims for violation of the DMCA and for tortious interference
 are referred to arbitration and no longer before this Court.

B. Bungie Has Not Pleaded Plausible Facts To Show Direct Copyright Infringement On The Part Of The Individual Defendants Currently Or Formerly Affiliated With Phoenix Digital

Each of the individual Defendants currently or formerly affiliated with Phoenix Digital has filed a declaration, signed under oath and subject to penalties of perjury, directly denying creating the “cheat software” at issue here. (See Dkt##s 40-1, 40-2 & 40-3.) None of these individuals has been involved in the creation or development of the subject software and, therefore, could not, and cannot, have “copied” any of the four works identified in Bungie’s First Amended Complaint. Furthermore, the unrefuted testimony of Mr. Schaefer is that Phoneix Digital does not and did not create any of the “cheat software” at issue here and, instead, obtained it from a third-party. (See, Dkt# 40-3, ¶¶9-13.) Again, this is supported by the sworn testimony of these individuals, which testimony is already of record.

Against this sworn testimony, Bungie offers *nothing* of evidentiary value and instead relies on its continued vague, conclusory accusations supported by nothing more than, “information and belief.” As courts have made crystal clear, where, as here, competent evidence is provided establishing a fact, an opposing party’s bald assertion to contrary is insufficient. See, *T-Mobile United States, Inc. v. Huawei Device United States, Inc.*, 115 F. Supp. 3d 1184, 1200 (W.D. Wash. 2015) (“The court need not accept a plaintiff’s bare allegations if the defendant controverts them with evidence.”). Despite ample opportunity, Bungie has come up with nothing more than attorney argument and bald assertions to contradict the sworn testimony submitted by Defendants. In short, Defendants have provided actual evidence, Bungie has not. Indeed, in the very case Bungie relies on, i.e., *Fluke Elecs. Corp. v. CorDEX Instruments, Inc.*, No. C12-2082JLR, 2013 WL 566949, at *2 (W.D. Wash. Feb. 13, 2013), this Court specifically noted that, “*the parties* have submitted affidavits *both in support and opposition* to the motion.” *Id.* (emphasis supplied). Here, Bungie has provided *no* affidavits, declarations or other actual evidence to support its hyperbolic claims.

As expressly noted and established in the declarations of Defendants Schaefer, Conway and Green, *none* of these defendants is, or ever has been personally engaged in

1 developing, writing or otherwise creating software for providing advantages in playing
 2 computer games, otherwise referred to by Bungie as “cheat software.” See, Dkt# 40-1 ¶¶ 4-
 3 5; Dkt# 40-2, ¶¶ 4-5; Dkt# 40-3 ¶¶ 7-8. Against the actual sworn testimony of these
 4 defendants that they did not and could not have copied any of Bungie’s purported copyrighted
 5 works, Bungie has offered *nothing* but wild speculation supported by nothing more than
 6 “information and belief.” As it is now more than one year after Bungie initially filed this
 7 lawsuit, Bungie has had more than ample time to conduct an investigation and find actual
 8 evidence, rather than “information and belief,” to support its claims. Its failure to do so is
 9 telling.

10 Notably, the claim by Bungie that this case is in the early stages and before Bungie has
 11 had an opportunity to conduct discovery rings hollow. Bungie’s various and repeated claims
 12 that, “Defendants each downloaded, installed, played, copied, and/or used Destiny 2 and
 13 therefore accepted the terms of the LSLA,” (First Amended Complaint Dkt# 34 at ¶ 49) and
 14 that, “In order to develop and distribute the Cheat Software, Schaefer, Conway, Green, and
 15 May each downloaded, installed, played, copied, or used Destiny 2,” (Dkt# 34 at ¶ 50) would,
 16 if true, have left a clear record on Bungie’s servers and would provide clear documentary
 17 evidence to support Bungie’s wild claims. However, more than one year after filing this case,
 18 Bungie has yet to offer any such evidence and, instead, relies on “information and belief.”
 19 Nonsense. Bungie does not need either permission from this Court or the cooperation of
 20 Defendants to access its *own* servers and see whether any evidence exists that either Phoenix
 21 Digital or Defendants Schaefer, Conway or Green *ever* accessed the Bungie servers and
 22 downloaded anything. Indeed, the complete failure to provide any such evidence, particularly
 23 in light of the Defendants’ sworn testimony that they did not access and did not copy
 24 Bungie’s purported software, strongly suggests that Bungie *cannot* do this, and cannot for the
 25 simple reason that Bungie’s allegations are simply untrue.

26 The simple fact remains that, if, as Bungie alleges, the Defendants “accessed”
 27 Bungie’s servers and “downloaded” various of Bungie’s purported works, such would have
 28

1 left a clear electronic trail that is fully accessible to Bungie and does not require any
 2 “discovery” for Bungie to obtain. Why, at this late stage, Bungie has not provided any such
 3 tangible evidence, but instead continues to rely on pure speculation and “information and
 4 belief,” compels the conclusion that such tangible evidence simply does not exist.

5 Given this Court’s clear directive that, “To sufficiently state its claims, Bungie must
 6 plead facts clarifying the individual’s alleged involvement in the challenged conduct,”
 7 (Dkt#33, p. 5), Bungie’s utter failure to plead more than it actually has not only defies
 8 common sense, it appears to defy this Court’s clear directive as well. The clear testimony of
 9 Defendants Schaefer, Conway and Green is that they did not create the allegedly infringing
 10 “cheat software,” that they never had access to the copyrighted works Bungie asserts here,
 11 and that they simply did not “copy” “create” or otherwise engage in the supposed copyright
 12 infringement Bungie baldly asserts here with no factual basis. Despite ample opportunity to
 13 do so, Bungie offers *nothing* to refute the sworn testimony of the individual Defendants.²

14 **C. The Defendants Did Not “Consent” To Jurisdiction Here**

15 In blatant disregard for the truth, Bungie continues to repeat the lie that the individual
 16 Defendants “consented” to jurisdiction here. The fact is they did not.

17 Bungie’s false claim that the individual Defendants “consented” to jurisdiction here is
 18 based on two false arguments. *First*, Bungie claims, with absolutely no evidence whatsoever,
 19 that the individual Defendants Schaefer, Conway and Green each “downloaded,” and
 20 “played” the “Destiny 2” game, and that by so doing, they agreed to the March 6, 2020
 21 “LSLA” upon which Bungie relies. *Second*, Bungie claims that, by pointing out, accurately,
 22 that the very terms of the agreement Bungie seeks to enforce *require* that such a claim be
 23 heard in arbitration, Defendants thereby consented to be bound by the terms of an agreement
 24

25 ² Similarly, Bungie’s reliance on the Preliminary Injunction (Dkt# 50) entered by this Court as
 26 proof that Bungie has sufficiently pleaded a cause of action for copyright infringement is misplaced.
 27 Defendants, as is their right, elected to oppose the motion on the ground that Bungie failed to establish the
 28 “immediate irreparable harm” needed to grant a proper injunction. In so doing, Defendants *did not* concede for
 purposes of this entire case that Bungie was likely to succeed in showing copyright infringement. Far from it.
 See Dkt# 39, p. 5, lines 20-22.

1 they had never signed, never agreed to, and, indeed, had never even seen before. Neither
2 argument has factual or legal basis.

3 As to Bungie’s false claim that Defendants have each accessed the Bungie website,
4 downloaded and then played the “Destiny 2” game, Defendants Schaefer, and Conway have
5 each testified under oath that they did no such thing. See, Dkt# 40-1 ¶¶ 3-6; Dkt# 40-3 ¶¶3-6.
6 Bungie has offered absolutely no evidence whatsoever (such as server computer access logs
7 or similar records in Bungie’s custody and control) to challenge any of these assertions.
8 Bungie continues to rely on “information and belief” and its own wild speculations rather than
9 offer any evidence at all to refute the clear testimony of Defendants Schaefer and Conway that
10 they never accessed a Bungie website and never downloaded or played “Destiny 2.” This
11 relevant testimony by Defendants Schaefer and Conway is and remains wholly unrefuted.

12 With respect to Defendant Jordan Green, Mr. Green testified that he, “never
13 downloaded, reviewed, read, ‘accepted,’ ‘clicked-on’ or otherwise agreed to the “Limited
14 Software License Agreement” that Plaintiff Bungie Inc. asserts in this action,”³ and that he
15 “never consented to be bound by the terms of the ‘Limited Software License Agreement’ that
16 Plaintiff Bungie Inc. asserts in this action.” See, Dkt# 34-2, ¶¶ 2-3. As it is the very March 6,
17 2022 agreement that Mr. Green denies ever seeing or agreeing to that Bungie relies on to
18 claim Mr. Green “consented” to jurisdiction here, it is incumbent on Bungie, faced with such
19 clear testimony, to provide refuting evidence if it can. Again, if Mr. Green’s testimony is
20 mistaken or otherwise untrue, it should be a simple matter for Bungie to access its *own* server
21 records and demonstrate otherwise. Again, Bungie fails to do this, again, apparently, because
22 *it cannot*.

23 Based on the foregoing, Bungie has not, and cannot, make a showing that any of
24 Defendants Schaefer, Conway or Green *ever* signed, “clicked on” “downloaded” or otherwise
25 “agreed” to the LSLA that Bungie claims evidences their “consent” to be sued here. Again,
26

27 3 Namely, the March 6, 2020 Agreement Bungie asserts in this action, Exhibit 6 to First
28 Amended Complaint, Dkt# 34-1, pp. 18-27.

1 evidence of such consent should *already* be in the possession of Bungie (again, it should be
2 on Bungie’s own servers), and Bungie’s conspicuous failure to do so speaks volumes.

3 As to Bungie’s second argument that, by agreeing to voluntarily arbitrate the claims
4 specified as being arbitrable under the LSLA, Defendants somehow “conceded” they had
5 entered into the LSLA, this claim is contrary to fact and unsupported by law. Defendants
6 have *never* conceded they are parties to the LSLA Bungie asserts here and have been careful
7 throughout to simply point out that, *if* Bungie seeks to assert claims under the LSLA, the
8 LSLA *itself* then requires that Bungie bring such claims in arbitration, not Federal Court.
9 (See, Dkt# 32, p. 11, lines 16-27.) As further noted by Defendants, it is for the Arbitrator, not
10 this Court, to determine whether a contract among the parties even exists in the first place.
11 The simple fact is that Defendants had never even seen the LSLA Bungie relies on, much less
12 agreed to it. If Bungie had actual evidence to the contrary, it would be a simple matter for
13 Bungie to identify it and plead it. Again, its failure to do the obvious is telling.

14 Finally, Bungie’s argument that, by pointing out that the LSLA requires arbitration
15 Defendants are somehow estopped from denying they are bound in all respects to the
16 agreement, is contrary to the very case law Bungie cites. In *Mundi v. Union Sec. Life*, 555
17 F.3d 1042 (9th Cir. 2009), “The question, [was] whether USLIC may enforce the arbitration
18 agreement, even though it is a nonsignatory to the agreement.” *Id.* In *Mundi*, the Court held
19 it could not. There was absolutely no indication whatsoever that USLIC was otherwise bound
20 to the contract it did not sign. Rather than support Bungie, the holding in *Mundi* is fully
21 consistent with and supports Defendants’ position. Similarly, none of the other cases cited by
22 Bungie holds that a party accurately pointing out that a contract it is accused of breaching
23 requires arbitration means that the party is estopped to deny having ever entered into the
24 contract. None of the cases cited by Bungie so holds, and Defendants are, and remain free, to
25 deny having ever entered into the LSLA Bungie seeks to enforce. Bungie’s claim that the
26 Defendants have “consented” to jurisdiction here is simply without factual or legal support.
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D. The Individual Defendants Did Not “Personally Participate” In The Supposed “Infringing Activities” Of Phoenix Digital

At it does throughout its Opposition, Bungie relies on bald, unsupported allegations that each of the individual Defendants “copied,” “reverse engineered” and otherwise personally engaged in “copyright infringement.” In so doing, Bungie ignores and fails to rebut the clear testimony of Defendants Schaefer, Conway and Green and, instead, intentionally ignores what each of these Defendants actually says in his sworn testimony. For example Bungie engages in pure word games when it claims that, “Schaefer, Conway, and Green do not rebut Bungie’s allegations that they downloaded and installed Destiny 2, that they copied Destiny 2, and that they used Destiny 2.” (Bungie Opposition, Dkt# 54, p. 7.) How Bungie can claim this in good faith is difficult to see. Mr. Schaefer clearly testifies that both he and Phoenix Digital, “never accessed any website owned, operated or controlled by Plaintiff Bungie, Inc.” Dkt# 40-3, ¶3. He further testifies that both Phoenix Digital and he never, “played or otherwise participated in any computer game offered or otherwise made available by Phoenix Digital Group LLC.” *Id.* at ¶4. He further testifies that he never did and does not, “personally design, develop write or otherwise create software for providing advantages in playing computer games, otherwise referred to by Bungie as ‘cheat software.’” *Id.* at ¶¶ 8-9. He further testifies that Phoenix Digital does not and never has actually created any “cheat software” (including such directed to “Destiny 2” or otherwise), but instead markets such software created by third-parties. *Id.* at ¶¶ 10-11. Finally, Mr. Schaefer testifies that Phoenix Digital, “does not possess, and has never possessed source code for any game developed by Plaintiff Bungie Inc., including source code for ‘Destiny 2,’” and that it, “does not possess, and has never ‘reverse engineered’ any source code for any game developed by Plaintiff Bungie Inc., including source code for ‘Destiny 2.’” *Id.* at ¶¶ 12-13. Against this clear testimony, how Bungie can creditably claim that this is not a denial of “copying” Bungie’s supposed work is difficult if not impossible to see. Again, if Bungie had or has any evidence whatsoever that Mr. Schaefer is either lying or mistaken, it is incumbent on Bungie

1 to provide it. Intentionally failing to understand the clear language of Mr. Schaefer's
2 testimony is *not* evidence that Mr. Schaefer personally participated in the supposed
3 "infringing activities" Bungie falsely claims.

4 Similarly, the testimony of Mr. Conway that he, too, never accessed a Bungie website,
5 never played or otherwise participated in a game offered by Bungie, including "Destiny 2"
6 and has never personally participated in the creation of any "cheat software," (Dkt# 40-1 at ¶¶
7 3,4,7&8) makes clear that Mr. Conway did not "copy" any work of Bungie or otherwise
8 personally engage in the "infringing activities" falsely asserted by Bungie.

9 Finally, the testimony of Mr. Green that he, too, does not, and never did, "design,
10 develop write or otherwise create software for providing advantages in playing computer
11 games, otherwise referred to by Bungie as 'cheat software,'" (Dkt# 40-2 at ¶ 4) and that he,
12 "never personally designed, developed written or otherwise created software for providing
13 advantages in playing the 'Destiny 2' computer game,'" (Dkt# 40-2 at ¶ 5) makes clear to any
14 honest reader that he, too, did not "copy" any claimed work of Bungie. Again, Bungie's
15 apparent argument that Defendants are somehow lying or hiding behind carefully crafted
16 word-games in their sworn declarations is wholly without basis and is no substitute for
17 complying with this Court's clear directive that "Bungie must plead facts clarifying the
18 individual's alleged involvement in the challenged conduct." (Dkt#33, p. 5).

19 At best, Bungie pleads only that Defendants Schaefer, Conway and Green were at one
20 time owners and operators of Phoenix Digital – something they have never denied. There is
21 and can be no evidence that they ever "copied," "reverse engineered" or otherwise
22 "personally participated" in the "infringing activities" Bungie falsely alleges here. To accept
23 otherwise would be tantamount to holding that Jeff Bezos is somehow *personally* liable, and
24 should be personally named as a co-defendant, each and every time Amazon is accused of
25 selling or distributing a product alleged to infringe a copyright.
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E. Defendants Did Not “Purposefully Direct” Their Activities Toward Washington State Or This District

Similarly, Bungie’s claims that the individual defendants purposefully directed their activities toward Washington State is wholly unsupported. At best, Bungie can only credibly claim that Defendants Schaefer, Conway and Green are, or at one time were, owners of Phoenix Digital, again something they have never denied. At best, Bungie can show that Phoenix Digital sold approximately four hundred dollars worth of the subject products in Washington State, (out of a total of approximately \$27,000 in gross sales). None of this is evidence that any of these individual defendants “purposefully directed” his activities toward Washington as opposed to the overall worldwide market generally. Given that Bungie cannot show that these individual defendants even participated in the supposed “infringing activities,” (which they did not) Bungie cannot credibly plead that by not engaging in these activities, Defendants nevertheless directed such activities toward the State of Washington.

F Bungie Fails To Plead A Plausible Claim For Copyright Infringement Against Mr. May

Unlike Defendants Schaefer, Conway and Green who never denied being owners of Phoenix Digital, Defendant James May is not and never has been. Bungie continues to try lumping Mr. May in with the other Defendants with vague, unsupported charges that he “copied” Bungie’s works. Again, Bungie hides behind “information and belief” to level its unsupported charges in this regard against Mr. May.

What Bungie apparently *is* able to back up with at least some arguable evidence is that Mr. May did, at one time, download the Destiny 2 game, did play it, and was “kicked off” of “Destiny 2” on several occasions. (Incidentally, Bungie’s ability to provide detailed information in this regard demonstrates its ability to review its server records and compile, if it can, information to support its allegations. Its failure to do so in the case of Defendants Schaefer, Conway and Green indicates that Bungie lacks the data to do so.) Based on Bungie’s own allegations that it does not tolerate “cheating” in “Destiny2” and that it has implemented measures to identify “cheaters” and deny them playing privileges, all this

1 indicates is that Mr. May has been found by Bungie to violate its terms of service. Again,
 2 under the clear holding in *MDY v. Blizzard*, this is only a breach of contract matter and *not* an
 3 act of copyright infringement. Aside from evidencing that, at one time Mr. May played
 4 “Destiny 2” and was on several occasions denied further playing privileges, this *does not*
 5 evidence that he somehow created the “cheat software” at issue here or that he “copied” or
 6 otherwise directly infringed one or more of Bungie’s claimed copyrights. Bungie has alleged
 7 no credible facts that he did.

8 Because Bungie has, at best, alleged that Mr. May breached the terms of Bungie’s
 9 LSLA, under the clear holding of *MDY v. Blizzard*, this is *not* copyright infringement and,
 10 instead, only a matter of contract law. Because this Court only has jurisdiction over any
 11 copyright claim Bungie can make (again, the contract matters are now the domain of the
 12 selected Arbitrator, not this Court) Bungie’s claim for copyright infringement – the only claim
 13 Bungie makes against Mr. May in its First Amended Complaint – should and must be
 14 dismissed.

15 CONCLUSION

16 For all the foregoing reasons, Defendants’ motion for partial dismissal should be
 17 granted and the individual defendants named in the First Amended Complaint should be
 18 dismissed from this action.

19 Dated July 15, 2022.

20 /s/ Philip P. Mann

21 Philip P. Mann, WSBA No: 28860

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